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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

WALLEN LAWSON,

Plaintiff,

v.

PPG ARCHITECTURAL FINISHES,  
INC.,

Defendant.

Case No. 8:18-CV-00705-JVS-JPR

**DEFENDANT PPG  
ARCHITECTURAL FINISHES,  
INC.'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, PARTIAL  
SUMMARY JUDGMENT**

**Judge: Hon. James V. Selna  
Hearing Date: November 7, 2022  
Time: 1:30 p.m.  
Courtroom: 10C**

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1 **I. INTRODUCTION**

2 This Court previously granted PPG's motion for summary judgment in its  
3 entirety. Plaintiff appealed as to his claims for violation of Labor Code section 1102.5  
4 and wrongful termination in violation of public policy. Although the California  
5 Supreme Court clarified the legal standard that applies to a Section 1102.5 retaliation  
6 case, the facts have not changed, and neither should the outcome of PPG's motion.  
7 Additionally, there has been no change to the legal standard for evaluating Plaintiff's  
8 claim for wrongful termination in violation of public policy, and thus the District Court  
9 properly applied the correct standard in previously granting PPG judgment on that  
10 claim.

11 Plaintiff Wallen Lawson was terminated from his employment for failing to  
12 perform the most essential duties of his job as a Territory Manager – developing and  
13 delivering sales plans to sell PPG products within Plaintiff's territory. After Plaintiff  
14 failed to attain his monthly sales quotas for eight of the prior twelve months, and  
15 struggled on consecutive market walks, he was placed on a Performance Improvement  
16 Plan ("PIP"). The goal of the PIP was to help Plaintiff improve his performance and  
17 help him meet the expectations and requirements of his job. At the conclusion of his  
18 initial 60-day PIP, the Company extended the PIP for an additional 30 days. Despite  
19 oversight from Human Resources and Plaintiff's Regional Sales Manager and  
20 Divisional Manager, Plaintiff was unable to meet the requirements of his position, and  
21 was terminated as a result.

22 Nearly a year after Plaintiff was terminated, he filed this lawsuit alleging he was  
23 terminated in retaliation for filing an *anonymous* complaint with PPG's independent  
24 ethics and compliance management provider. PPG does not deny that it received two  
25 anonymous reports (one in April 2017 and one in June 2017). Judgment for PPG,  
26 however, should once again be granted on Plaintiff's First and Second Causes of Action  
27 for retaliation and wrongful termination in violation of public policy because Plaintiff  
28 cannot prove that *anyone* at PPG knew that **Plaintiff** submitted any complaints –

1 anonymous, or otherwise – to PPG’s independent ethics and compliance management  
2 provider. Indeed, the evidence is clear that it was not until this action was filed that PPG  
3 learned Plaintiff was the anonymous reporter. Moreover, Plaintiff’s own manager was  
4 unaware that *any* such complaint had been made by anyone, let alone that Plaintiff was  
5 the reporting party.

6 Ultimately, Plaintiff cannot point to any *evidence* that his anonymous complaints  
7 were a contributing factor to his termination. Even if Plaintiff could overcome this  
8 insurmountable barrier to establishing a claim by a preponderance of the evidence, his  
9 Section 1102.5 claim still fails because PPG can show by clear and convincing evidence  
10 that Plaintiff was terminated for a legitimate and non-retaliatory reason, even if Plaintiff  
11 also allegedly engaged in protected activity.

12 Given Plaintiff still cannot show that his anonymous complaint played any role  
13 in the Company’s decision to terminate his employment, summary judgment once again  
14 should be granted on Plaintiff’s two remaining causes of action.

## 15 **II. STATEMENT OF UNCONTROVERTED MATERIAL FACTS**

### 16 **A. Plaintiff worked as an at-will territory manager for PPG.**

17 PPG manufactures and sells interior and exterior paints, stains, caulks, repair  
18 products, adhesives and sealants for homeowners and professionals. During Plaintiff’s  
19 employment, PPG sold its products through its own retail stores, and through other  
20 retailers such as The Home Depot, Menards, and Lowe’s. Plaintiff was hired in June  
21 2015, as a Territory Manager (“TM”). (SAC, Dkt. 37 (“SAC”), ¶2.) In his role as a TM,  
22 Plaintiff managed PPG’s sales at several Lowe’s stores in and around Orange County,  
23 California. Plaintiff worked independently in the field and reported to a Regional Sales  
24 Manager (“RSM”) who managed a team of TMs. At the start of his employment,  
25 Plaintiff reported to RSM Paul Stanton, and, after Paul Stanton was terminated from  
26 PPG for performance reasons, Plaintiff reported to RSM Clarence Moore (“Moore”)  
27 who was based in Phoenix, Arizona. (Lawson Depo., 28:5-7; Mayhew Depo., 52:11-  
28 18.) Moore reported to Divisional Manager Sean Kacsir (“Kacsir”), who was based in

1 Kansas City, Kansas. (Kacsir Depo., 15:20-16:8.)

2 As a TM, Plaintiff was responsible for developing and delivering sales plans and  
3 managing and increasing the sales of PPG products within his defined territory. (Moore  
4 Depo., 130:6-20, Plaintiff's Exh. 36.<sup>1</sup>). Plaintiff describes his role as a TM as being "an  
5 ambassador for the PPG company." (Lawson Depo., 19:23-20:15.) As a TM, Plaintiff  
6 was paid an annual salary and subject to an annual sales incentive plan. (Plaintiff's Exh.  
7 36.)

8 Some of Plaintiff's "Key Responsibilities" included: 1) partnering with Lowe's  
9 management teams to develop, drive, and achieve sales growth plans; 2) working cross-  
10 functionally with all appropriate Lowe's departments to exceed sales goals; 3) meeting  
11 with all Lowe's store personnel weekly, and the District Manager once a month to  
12 review sales performance against target; 4) analyzing territory sales performance  
13 reports and developing strategic territory business plans to support growth; and 5)  
14 aggressively identifying in-store selling opportunities. (*Id.*; Moore Depo., 130:6-20,  
15 Plaintiff's Exh. 36.)

16 **B. Although Plaintiff had some initial success, starting in October 2016,**  
17 **Plaintiff failed to consistently meet his monthly sales quota and**  
18 **subsequently struggled with his market walks.**

19 One of the key metrics of success as a TM is the ability to meet monthly sales  
20 goals. (Moore Decl., ¶ 4.) The sales goal is the total of the sales for that TM's specific  
21 stores in the previous year. (*Id.*) The TM only needs to sell the same amount of product  
22 as was sold in that same month the previous year to meet their goal. (*Id.*) PPG reviews  
23 TMs' sales numbers on a quarterly basis. (Kacsir Depo., 110:10-21.) For the twelve-  
24 month period of April 2016 to March 2017, Plaintiff only met his monthly goal four  
25 times. (Lawson Depo., 148:17-149:3, Exh. 9.) Plaintiff missed his goal for six  
26 consecutive months beginning in October 2016. (*Id.*)

27 ///

28 <sup>1</sup> Plaintiff's Exhibits are attached as Exhibit G to the Cogbill Declaration.



1 Since TMs work remotely in the field, the Company also uses Market Walks as  
2 a means for a RSM to coach, train and measure the performance of TMs against defined  
3 criteria. (Moore Decl., ¶ 6.) On Market Walks, RSMs and TMs visit several stores  
4 within a TM's territory and walk through the store to ensure TMs are building  
5 relationships with Lowe's employees, PPG product is properly placed throughout the  
6 store, and TMs are training and helping customers. (Lawson Depo., 21:24-22:14; 25:24-  
7 26:21.) Market Walks are scored in these categories: 1) Sales Results; 2) Sales  
8 Operations Checklist; 3) Sales Planning; 4) Relationships; 5) Merchandizing; 6) Sales  
9 Tactics; 7) Pro Sales; 8) Administrative Duties; 9) Safety; and 10) Bonus Points. (Moore  
10 Decl., ¶¶ 7-8, Exh. A.) A TM's raw Market Walk score falls into one of five categories:  
11 1) Exceptional; 2) Excels; 3) Successful; 4) Marginal; or 5) Unsuccessful. (*Id.*) Plaintiff  
12 testified both his RSMs, Stanton and Moore, conducted Market Walks in pretty much  
13 the same manner. (Lawson Depo., 26:22-28:17.)

14 In October 2016, Plaintiff conducted a Market Walk with RSM Stanton. (Moore  
15 Decl., ¶8, Ex. B.) On that particular Market Walk, Plaintiff excelled and received a  
16 score of 92. (*Id.*) However, Plaintiff struggled on three straight Market Walks thereafter  
17 in December 2016, March 2017, and April 2017. (Moore Decl., ¶¶ 9, 11, Exhs. B, C;  
18 Lawson Depo., 148:17-149:3, Exh. 9.)

19 **1. Plaintiff scored "Marginal" on his December 2016 Market Walk**  
20 **and "unsuccessful" on his March 2017 Market Walk.**

21 After RSM Stanton was terminated, RSM Moore temporarily took over for the  
22 Southern California region, including Plaintiff's territory. (Lawson Depo., 31:1532:6.)  
23 Unlike Stanton, Moore provided Plaintiff with a pre-Market Walk checklist to help  
24 Plaintiff achieve successful results on his Market Walk. (Lawson Depo., 23:16-24:14.)  
25 Moore also spoke with Plaintiff before his scheduled Market Walks so Plaintiff could  
26 prepare to walk certain stores. (Lawson Depo., 24:15-22.)

27 In December 2016, Moore conducted a Market Walk with Plaintiff. (Moore  
28 Decl., ¶ 9.) This was the first Market Walk Moore conducted with Plaintiff, and together

1 they visited 3 stores. (*Id.*) Plaintiff scored a 60 – “Marginal”, which was just one point  
2 above an “Unsuccessful” rating. (Moore Decl., ¶¶ 6, 9, Exh. B.) Some areas where  
3 Moore noted Plaintiff struggled included: 1) failing to have PPG product in specific  
4 locations; 2) failing to complete monthly goals and then representing on his checklist  
5 the goal had been completed; 3) failing to build relationships and communicate with  
6 key Lowe’s employees; and 4) failing to update Plaintiff’s Training Roster on each visit.  
7 (*Id.*) A Training Roster is a list of Lowe’s associates that work at each of the stores  
8 within a TM’s territory, and Training Rosters had to be updated by the TM after every  
9 visit to each store. (Moore Decl., ¶ 5.)

10 By early 2017, RSM Moore’s territory officially changed to include Southern  
11 California, including Plaintiff’s territory. (Moore Decl., ¶ 10.) In March 2017, Moore  
12 conducted another Market Walk with Plaintiff. (Moore Decl., ¶ 11, Ex. C.) They visited  
13 three stores in Plaintiff’s territory. (*Id.*) Plaintiff scored a 58 – “Unsuccessful”. (*Id.*)  
14 Plaintiff testified that following his March Market Walk, he received a verbal warning.  
15 (Lawson Depo., 71:3-8.) Following the Market Walk, Moore sent Plaintiff a detailed  
16 email identifying numerous shortcomings and areas for improvement. (Moore Depo.,  
17 146:4-11, Plaintiff’s Exh. 38.)

18 Some issues Moore identified included: 1) Plaintiff failed to contemporaneously  
19 update his Training Roster, and failed to include some of Plaintiff’s stores in his  
20 Training Roster altogether; 2) Plaintiff failed to establish relationships with key Lowe’s  
21 staff members; 3) Plaintiff was unfamiliar with a key tool that provided TMs with  
22 critical product information; and 4) Plaintiff failed to stock PPG product in required  
23 locations. (*Id.*)

24 By mid-April 2017, PPG had received Plaintiff’s 12-month sales numbers  
25 through March 2017. (Moore Decl., ¶ 12.) Because Plaintiff had missed 8 of the 12  
26 months, the recommendation was to place Plaintiff on a PIP. (*Id.*) Andy Mayhew,  
27 Human Resources Manager, and Moore discussed the PIP, and concluded that one  
28 reason a PIP was appropriate was because Plaintiff had failed to achieve his sales goal

1 for six straight months.<sup>2</sup> (Mayhew Depo., 54:6-55:19; Moore Depo., 137:14-138:4,  
2 139:10-140:6, Plaintiff's Exh. 37.) The decision to put Plaintiff on a PIP was ultimately  
3 made by Human Resources. (Kacsir Depo., 79:24-80:15; Moore Depo., 137:14-138:4,  
4 139:10-140:6; 154:1-5, 223:4-9; Mayhew Depo., 40:23-41:5; Plaintiff's Exh. 37.)

5 **2. Plaintiff again scored "Unsuccessful" on his April 2017 Market**  
6 **Walk.**

7 On April 21, 2017, Plaintiff and RSM Moore completed another multi-day  
8 Market Walk. (Lawson Depo., 69:11-70:17.) This time, Plaintiff scored a 46 –  
9 "Unsuccessful". (*Id.*, 143:16-144:3, Exh. 9.) As with prior Market Walks, Plaintiff had  
10 failed to complete numerous national and regional monthly objectives, including 1)  
11 training Lowe's associates and completing his Training Roster; 2) completing PPG  
12 product demonstrations and displays; and 3) obtaining the contact information of  
13 specific Lowe's employees. (*Id.*) This was the second consecutive Market Walk that  
14 Plaintiff scored "Unsuccessful", and third consecutive Market Walk where Plaintiff had  
15 issues with his Training Roster. At the conclusion of the Market Walk on April 21,  
16 2017, Moore discussed Plaintiff's performance issues with him. (Lawson Depo.,  
17 144:4-14.)

18 **C. On the same day Plaintiff's April Market Walk concluded, an**  
19 **anonymous report was submitted to PPG's third-party ethics portal.**

20 PPG maintains an Ethics Helpline operated by a third-party administrator which  
21 provides PPG employees a secure way to anonymously report issues. (Duffy Decl., ¶ 4.)  
22 PPG also maintains a Global Code of Ethics which advises employees how to raise  
23 concerns through an online feature called the Compliance Portal, or through a toll-free  
24 phone number called the Ethics Helpline, both of which are operated by an independent  
25 third-party provider, Convercent. (Duffy Depo., Decl., ¶ 5.) Convercent receives and  
26

27 <sup>2</sup> Any attempt by Plaintiff to blame his failure to meet his sales numbers on a territory  
28 realignment is futile because sales goals are set based on the performance at that same  
store in the prior year. (Moore Decl., ¶4.)

1 documents any ethics reports. (Dalton Depo., 42:4-7, 99:22-24.)

2 On April 21, 2017, an anonymous report was submitted to Convercent's online  
3 Compliance Portal. (Dalton Depo., 49:14-22, Plaintiff's Exh. 2; Lawson Depo.,  
4 154:19-25.) The anonymous report stated that on April 18, 2017, an unidentified  
5 "supervisor request[ed] territory managers purposely mis-mix product (paint) for the  
6 purpose of getting rid a of a slow moving product off the shelves and selling it at a  
7 reduced price."<sup>3</sup> (Plaintiff's Exh. 2.) The anonymous reporter was informed that,  
8 "Neither Convercent Staff nor your organization will receive your contact information."  
9 (*Id.*) The anonymous reporter specifically requested to remain completely anonymous.  
10 (Lawson Depo., 149:21-150:5, Exh. 10.)

11 David Duffy, PPG's Senior Manager of Corporate Security and Investigations,  
12 promptly sought to investigate the anonymous report. (Duffy Depo., 106:21-107:4.) The  
13 anonymous report PPG received indicated the anonymous reporter was calling in  
14 relation to a store in Long Beach, CA. (Lawson Depo, Exh. 10.) Using the Compliance  
15 Portal, PPG informed the anonymous reporter that it had received and was reviewing  
16 the anonymous report. (*Id.* at p. 3) On April 26, 2017, PPG followed up with the  
17 anonymous reporter and requested more information regarding where the alleged  
18 directive to mis-tint paint occurred since it had no store in Long Beach. (*Id.*) Despite  
19 PPG's follow-up inquiry requesting additional information, the anonymous reporter  
20 failed to provide any additional information, including their identity, and PPG closed  
21 the investigation. (*Id.*, Duffy Depo., 58:6-13, 59:12-15). Duffy was unaware that  
22 Plaintiff was the anonymous reporter. (Duffy Depo., 57:19-23.)

23 During his deposition, Plaintiff testified he submitted this April 2017 complaint  
24 anonymously because he did not want Moore, or anyone else at PPG to know he was  
25 submitting a report. (SAC ¶¶ 8, 15; Lawson Depo., 154:19-155:13, 157:3-5.) Plaintiff  
26

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27 <sup>3</sup> Some of PPG's paint is sent to PPG's customers (e.g., Lowe's) in a neutral base color  
28 that is then tinted on-site to fulfill a specific order. A mis-tint occurs when the base paint  
color is incorrectly tinted. (See SAC, ¶ 8.)

1 also testified this was the first time Moore directed Plaintiff to intentionally mis-tint  
2 paint. (Lawson Depo., 158:4-7.) Critically, Plaintiff testified he has no reason to believe  
3 Moore knew Plaintiff made this anonymous report. (*Id.*, 170:37.) In fact, Plaintiff  
4 admits he ***told no one*** at PPG that he submitted this anonymous complaint. (*Id.*, 169:25-  
5 170:2.) With respect to Moore, Plaintiff explicitly confirmed that he never told Moore  
6 that he submitted a complaint to PPG:

7 Q. And did you tell Mr. Moore that you had actually  
8 submitted a complaint or reported him to PPG?

9 A: No. No. No, I didn't.

10 (Lawson Depo., 157:3-5.)

11 **D. The PIP was delivered to Plaintiff on May 12, 2017.**

12 Consistent with their early discussions, Mayhew worked with Moore to draft  
13 Plaintiff's PIP. The PIP was delivered to Plaintiff on May 12, 2017. (Lawson Depo.,  
14 73:21-25, 143:16-144:3, Exh. 9.) Plaintiff's PIP identified numerous deficiencies in his  
15 performance, including: 1) missing his sales goal in 8 of the last 12 months; 2) making  
16 inaccuracies in a Training Roster he submitted on May 1, 2017; 3) repeatedly exceeding  
17 his allotted five hours of Admin Time per week without pre-approval from his RSM; 4)  
18 failing to complete monthly regional and national objectives; and 5) scoring two  
19 consecutive "Unsuccessful" Market Walks on March 15, 2017, and April 21, 2017.  
20 (Lawson Depo., 143:16-144:3, Exh. 9.) The PIP provided the expected measurable  
21 goals that Plaintiff was to accomplish, including: 1) meeting his sales goal for Q2, 2)  
22 maintaining an accurate training roster; 3) keeping Admin Time to 5 hours, absent prior  
23 approval; 4) timely completing regional and national initiatives; and 5) having a  
24 "Successful" Market Walk "prior to the end of the PIP to continue employment." (*Id.*)  
25 Plaintiff's PIP was set to expire on July 7, 2017.

26 The goal of Plaintiff's PIP was to help Plaintiff improve his performance and  
27 help him meet the expectations and requirements of his role as a TM. (Moore Depo.,  
28 156:22-157:2, Lawson Depo., 143:16-144:3, Exh. 9, Kacsir Depo., 80:22-81:10.)

1           **E.     The Company received an anonymous complaint on June 15, 2017,**  
2           **which the Company immediately investigated.**

3           On June 15, 2017, an anonymous complaint was submitted to PPG's Ethics  
4 Helpline.<sup>4</sup> (Lawson Depo., 162:18-163:12, 164:8-10; 164:24-165:22, Exhs. 12, 13.) The  
5 Helpline is managed by Convercent, who intakes the information and then passes along  
6 certain details/information to PPG. The June 15, 2017, anonymous complaint was  
7 submitted through Convercent's call center and the anonymous reporter stated a  
8 regional manager asked TMs to purposely mis-tint paint, and referenced a prior  
9 complaint submitted in April 2017. (*Id.*) The anonymous reporter indicated they wanted  
10 to remain anonymous to the organization, and that they had not reported the incident in  
11 question to any supervisors or management. (*Id.*)

12           It was not until the Complaint in this case was filed, that Plaintiff identified  
13 himself as the anonymous reporter. Plaintiff testified he understood that the person he  
14 submitted the complaint to was employed by a third-party, and was not a PPG  
15 employee. (Lawson Depo., 160:3-5, 162:10-17.) Likewise, Plaintiff confirmed he once  
16 again submitted his second complaint *anonymously*. (Lawson Depo., 160:16-18.) When  
17 PPG received the complaint, it did not receive the identity of the anonymous reporter  
18 (Duffy Decl., ¶ 8), and Plaintiff admitted he has no evidence to the contrary. (Lawson  
19 Depo., 162:1-4.)

20           Similar to the anonymous complaint submitted in April 2017, PPG commenced  
21 an investigation led by Duffy, who was assisted by John "Ian" Dalton, PPG's Forensic  
22 Audit and Loss Prevention Specialist. (Duffy Depo., 14:1-21, Dalton Depo., 10:19-22.)  
23 As part of the investigation, Duffy asked whether the anonymous reporter would speak  
24 with PPG regarding the information in the anonymous complaint. (Lawson Depo.,  
25 164:14-165:13, Exhs. 12, 13; Duffy Depo., 9:12-17.) The anonymous reporter agreed  
26

27 <sup>4</sup> Curiously, Plaintiff's Second Amended Complaint, which was filed *after* Plaintiff's  
28 deposition, makes no mention of this June 2017 complaint, nor does he attribute it as a  
reason for his termination.



1 to speak with Duffy and provided PPG with a phone number. (Lawson Depo., 165:2-22;  
2 Exh. 13.) PPG confirmed the conversation would be confidential. (*Id.*, 165:14-22; Exh.  
3 13.)

4 The first time Duffy called the anonymous reporter, no one answered, and Duffy  
5 left a voicemail.<sup>5</sup> (Lawson Depo., 165:23-166:2.) On or around June 29, 2017, Duffy  
6 spoke with the anonymous reporter for about 15-20 minutes. (Lawson Depo.,  
7 168:14-17.) During their call, Plaintiff does not remember ever identifying himself to  
8 Duffy, and Duffy never referred to Plaintiff by name. (Lawson Depo., 168:18-23.)  
9 When Duffy spoke to the anonymous reporter, Duffy guaranteed the reporter  
10 confidentiality. (Duffy Depo., 16:8-15.) Duffy testified that to his knowledge, he did  
11 not know he was speaking to Plaintiff. (Duffy Depo., 16:10-15, 18:20-19:4, 20:7-10,  
12 24:24-25:5.)

13 After Duffy spoke with the anonymous reporter, he emailed Dalton and  
14 Alejandro Sanchez Monjaraz, Global Forensic Audit Director, and stated:

15 The reporter was kind enough to provide a phone number on  
16 the posted message last night. I spoke to the reporter this  
17 afternoon. **The reporter did not provide a name – since**  
18 **they were still concerned about remaining anonymous...**I  
advised the caller to keep us informed if anything changed  
or if new information comes to light.

19 (Dalton Depo., 62:6-63:16, Plaintiff's Exh. 4 (emphasis added).)

20 On July 6, 2017, Dalton met with Moore to interview him regarding the June  
21 2017 Complaint. (Moore Depo., 40:19-22; Dalton Depo., 50:24-51:7, Plaintiff's  
22 Exh. 3.) Moore understood his conversation with Dalton was confidential. (Moore  
23 Depo., 46:21-25, 94:3-5.) Dalton told Moore PPG's investigation was initiated to  
24

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25 <sup>5</sup> In opposition to PPG's prior motion, Plaintiff speculated that Duffy learned his  
26 identity through Plaintiff's voicemail greeting, and then further speculated that Duffy  
27 then shared Plaintiff's identity with either Dalton or Human Resources Director  
28 Michelle Minda. Even if it reasonably could be assumed that Duffy learned Plaintiff's  
identity in this manner, there is no evidence that he shared it with Dalton or Minda, both  
of whom were unaware Plaintiff was the anonymous reporter until after this lawsuit was  
filed. (Dalton Depo., 37:19-23, 63:25-64:5, 75:6-10; Minda Depo., 59:6-61:2.)

1 review expensed-out product, but never revealed to Moore that an anonymous  
2 complaint had been filed. (Dalton Depo., 38:16-39:6; Moore Depo., 40:9-18.) During  
3 their interview, Dalton told Moore to send a text message to his TMs that instructed  
4 them not to mis-tint paint anymore. (Dalton Depo., 55:17-21; Dalton Depo., 73:14-  
5 74:13, Plaintiff's Exh. 6; Moore Depo., 96:18-20.)

6 As part of the investigation, Dalton also interviewed all fourteen TMs that  
7 reported directly to Moore. (Dalton Depo., 50:24-51:7; Plaintiff's Exh. 3.) The TMs  
8 informed Dalton that Moore instructed them to mis-tint paint during multiple weekly  
9 conference calls. (Dalton Depo., 56:2-15.) Additionally, several TMs stated one TM,  
10 Laura Sanchez, openly opposed Moore's directive to mis-tint paint, and stated she  
11 would not carry out the practice. (Dalton Depo., 57:8-14.)<sup>6</sup> Dalton also interviewed  
12 Kacsir, to determine if Kacsir directed Moore to instruct TMs to intentionally mis-tint  
13 paint. (Dalton Depo., 58:11-59:8, 59:15-23.) Kacsir confirmed he gave no such  
14 instruction to Moore. (*Id.*) Similar to Moore, Kacsir did not know the extent of the  
15 investigation, or that it was initiated because PPG had received an anonymous  
16 complaint. (Kacsir Depo., 47:22-48:8, 50:25-51:10, 55:25-56:3, 63:9-17, 63:23-64:4,  
17 71:14-21.) Moore did not know Dalton interviewed anyone else during the Company's  
18 investigation, including Kacsir or the fourteen TMs that reported to Moore. (Moore  
19 Depo., 47:9-15, 64:9-12, 79:14-80:3.)

20 Notably, similar to the first complaint Plaintiff alleges he made in April 2017,  
21 Plaintiff never told Moore or anyone else at PPG he submitted this June 2017 complaint.  
22 (Lawson Depo., 169:15-24.) Dalton did not learn Plaintiff was the anonymous reporter  
23 until after this lawsuit was filed. (Dalton Depo., 37:19-23, 63:25-64:5, 75:6-10.)

24 **F. PPG extended Plaintiff's PIP for an additional 30 days to allow him**  
25 **more time to meet the PIP.**

26 On or around June 29, 2017, Plaintiff spoke with Mayhew and said he felt Moore

27 \_\_\_\_\_  
28 <sup>6</sup> Sanchez remained employed as a TM until Lowe's cancelled its contract with PPG  
in March 2018. (Moore Decl., ¶ 17.)



1 was not properly overseeing his PIP. (Lawson Depo., 146:16-25, Mayhew Depo.,  
2 12:23-13:3, 49:12-16, 50:17-24.) Later that day, Mayhew emailed Kacsir and relayed  
3 Plaintiff's concerns regarding his two "Unsuccessful" Market Walks from March and  
4 April 2017, and Plaintiff's feelings that Moore was not overseeing his PIP closely  
5 enough. (Mayhew Depo., 99:7-14; Plaintiff Exh. 49.) Mayhew also told Kacsir he  
6 wanted to be included on all weekly PIP calls between Moore and Plaintiff. (*Id.*;  
7 Mayhew Depo., 15:3-10.)

8 Plaintiff did not meet his monthly sales goal for April, May and June 2017,  
9 scoring 95.4%, 94.4% and 86.1%, respectively. (Moore Depo., 223:21-224:20  
10 Plaintiff's Exh. 46.) On July 13, 2017, Plaintiff completed another multi-day Market  
11 Walk with Moore. (Lawson Depo., 49:13-50:11, Exh 1.) On this Market Walk, Plaintiff  
12 scored a 66 – "Marginal" – which was higher than his previous three Market Walks  
13 with Moore, but did not meet the PIP expectation of "Successful." During the Market  
14 Walk, Moore told Plaintiff he would see if he could get Plaintiff's PIP extended for him.  
15 (Lawson Depo., 91:11-25.)

16 Although Plaintiff had not met the requirements of the PIP, Mayhew, Kacsir, and  
17 Moore decided to extend it for an additional 30 days because Plaintiff had shown some  
18 improvement. (Lawson Depo., 91:11-92:17, 146:16-147:3, Mayhew Depo.,  
19 58:24-59:10, 79:1-80:8.) Additionally, Moore supported extending the PIP because he  
20 recognized he had not been able to check-in with Plaintiff as frequently as Moore  
21 intended, and Moore did not take the decision to terminate Plaintiff lightly. (Moore  
22 Decl., ¶ 13.) After Plaintiff's PIP was extended, Mayhew estimates he spoke with  
23 Plaintiff every other week. (Mayhew Depo., 15:22-16:8.)

24 **G. After another Unsuccessful Market Walk, Plaintiff was terminated.**

25 To determine whether Plaintiff had successfully met his PIP, Kacsir asked Moore  
26 to conduct an additional Market Walk during Plaintiff's last week of his extended PIP.  
27 (Moore Depo., 202:6-204:1, Plaintiff's Exh. 43.) The Market Walk concluded on  
28 August 17, 2017, with Plaintiff scoring a 40 – "Unsuccessful" – his worst Market Score

1 during his entire employment. (Lawson Depo., 103:10-19, 137:10138:20, Exhs. 6, 7.)  
2 Both Moore and Kacsir attended this Market Walk. (Lawson Depo., 59:11-14.) Some  
3 issues identified on Plaintiff's August 2017 Market Walk were: 1) Plaintiff only visited  
4 his second highest volume store once in over five weeks; 2) Plaintiff achieved no  
5 national or regional objectives at three of his stores; 3) Plaintiff failed to train associates  
6 according to a monthly objective; 4) Plaintiff was not tracking sales of at least one PPG  
7 product; 5) Plaintiff failed to setup product displays; and 6) Plaintiff failed to update his  
8 Training Roster and his Training Roster had an inaccuracy in it. (Lawson Depo.,  
9 103:10-19, Exh 6; Moore Depo., 216:14-217:7.)

10 Notably, while on this Market Walk with Moore, Plaintiff also failed to adhere  
11 to PPG's safety guidelines, and Plaintiff later violated Company policy when he was  
12 using his cell phone while driving. (Lawson Depo., 115:2-7.) Kacsir reviewed  
13 Plaintiff's August 2017 Market Walk score and, based on what Kacsir witnessed during  
14 the Market Walk, Kacsir believed that Plaintiff's August 2017 Market Walk was fairly  
15 scored. (Kacsir Depo., 133:5-10.) Kacsir and Moore met with Plaintiff the following  
16 morning to discuss Plaintiff's Market Walk results with him. (Lawson Depo., 102:22-  
17 103:9.)

18 Following the Market Walk, Moore recommended that the Company proceed  
19 with terminating Plaintiff's employment. (Moore Decl., ¶14.) On September 6, 2017,  
20 Plaintiff met with Moore and Mayhew; Moore and Plaintiff met in-person and Mayhew  
21 attended the meeting via telephone. (Lawson Depo, 138:21-139:18; Exh. 8.) Mayhew  
22 informed Plaintiff he was being terminated for Plaintiff's inability to perform to PPG's  
23 standards set forth in Plaintiff's PIP, and for falsifying his training roster.<sup>7</sup> (Lawson  
24

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25 <sup>7</sup> Plaintiff admitted he did not do the training reflected in his roster, and acknowledged  
26 such action was falsifying company documents. (Mayhew Depo., 19:14-20:17.)  
27 Plaintiff also admitted inputting information incorrectly, and, sometimes, his training  
28 rosters were wrong. (Lawson Depo., 129:17-130:25.) Plaintiff admitted the roster and  
his store log-in reports may have had discrepancies such that the roster showed he  
trained Lowe's employees when he was not present at that store. (*Id.* at, 126:4-128:6.)

1 Depo., 138:21-139:18; Exh. 8; Mayhew Depo., 90:9-16; Moore Depo., 227:24-228:6.)  
2 Neither Duffy nor Dalton, the two individuals who lead the investigation into the June  
3 2017 anonymous complaint, were involved in the decision to terminate Plaintiff. (Duffy  
4 Depo., 33:21-34:11; Dalton Depo., 64:9-16.) Moore, Kacsir and Mayhew first learned  
5 Plaintiff submitted a complaint to the ethics hotline after Plaintiff filed this lawsuit.  
6 (Moore Depo., 70:1-7; Kacsir Depo., 69:16-70:4; Mayhew Depo., 35:9-14.)

### 7 **III. PROCEDURAL HISTORY**

8 In his SAC, Plaintiff asserted six causes of action against PPG. On June 26, 2019,  
9 this Court granted PPG's motion for summary judgment in its entirety. Thereafter,  
10 Plaintiff appealed the Court's judgment on only two of his claims: (1) retaliation in  
11 violation of California Labor Code section 1102.5, and (2) wrongful termination in  
12 violation of public policy.

13 On appeal, the Ninth Circuit acknowledged that Courts were applying different  
14 standards when considering a Section 1102.5 claim on summary judgment. To resolve  
15 the issue, the Ninth Circuit certified the following question to the California Supreme  
16 Court: Does the evidentiary standard set forth in section 1102.6 of the California Labor  
17 Code replace the *McDonnell Douglas* test as the relevant evidentiary standard for  
18 retaliation claims brought pursuant to section 1102.5 of California's Labor Code? (Case  
19 19-55802, Dkt. 56). The California Supreme Court confirmed that section 1102.6, and  
20 not the *McDonnell Douglas* test, was the relevant evidentiary standard for retaliation  
21 claims brought under Section 1102.6. *Lawson v. PPG Architectural Finishes, Inc.*, 12  
22 Cal. 5th 703, 712 (2022) ("*Lawson*") The California Supreme Court did not change the  
23 applicable standard for a common law claim of wrongful termination in violation of  
24 public policy. The Ninth Circuit then vacated the District Court's order and remanded  
25 for further proceedings consistent with *Lawson*.

### 26 **IV. LEGAL ARGUMENT**

#### 27 **A. Standard for granting summary judgement.**

28 Summary judgment is appropriate where the record, read in the light most

1 favorable to the nonmoving party, indicates that “there is no genuine issue as to any  
2 material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed.  
3 R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Material  
4 facts are those necessary to the proof or defense of a claim, as determined by reference  
5 to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual  
6 issue is genuine “if the evidence is such that a reasonable jury could return a verdict for  
7 the nonmoving party.” *Id.* In deciding a motion for summary judgment, “[t]he evidence  
8 of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his  
9 favor.” *Id.* at 255. But if the evidence of the nonmoving party “is merely colorable, or  
10 is not significantly probative, summary judgment may be granted.” *Id.* at 249–50.

11 The moving party has the initial burden of establishing the absence of a material  
12 fact for trial. *Anderson*, 477 U.S. at 256. “If a party fails to properly support an assertion  
13 of fact or fails to properly address another party’s assertion of fact ..., the court may ...  
14 consider the fact undisputed.” Fed. R. Civ. P. 56(e)(2). Furthermore, “Rule 56[(a)]  
15 mandates the entry of summary judgment ... against a party who fails to make a showing  
16 sufficient to establish the existence of an element essential to that party’s case, and on  
17 which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 322.  
18 Therefore, if the nonmovant does not make a sufficient showing to establish the  
19 elements of its claims, the Court must grant the motion. “The mere existence of a  
20 scintilla of evidence ... will be insufficient; there must be evidence on which the jury  
21 could reasonably find for the [non-moving party].” *Anderson*, 477 U.S. at 252.

22 **B. Plaintiff’s First Cause of Action for violation of Labor Code § 1102.5**  
23 **fails for multiple reasons.**

24 According to his Second Amended Complaint, Plaintiff alleges he “complained  
25 to PPG’s ethics hotline that he was instructed by his Regional Manager, Moore, to  
26 mistint paint in Lowe’s stores.” (SAC, Dkt. 37, ¶37.) Plaintiff summarily concludes he  
27 was retaliated against “for reporting his employer’s unlawful conduct and practices to  
28 the employer’s ethics hotline, and for opposing and refusing to participate in what he

1 reasonably believed to be unlawful conduct by his employer...” (SAC, Dkt. 37, ¶38.)

2 California Labor Code section 1102.5(b), incorrectly cited by Plaintiff as  
3 subsection (a) in the SAC, provides in relevant part that “an employer...shall not  
4 retaliate against any employee for disclosing information...to a government or law  
5 enforcement agency, to a person with authority over the employee or another employee  
6 who has the authority to investigate, discover, or correct the violation or  
7 noncompliance...if the employee has reasonable cause to believe that the information  
8 discloses a violation of state or federal statute...” Section 1102.5(c) prohibits retaliation  
9 “against an employee for refusing to participate in an activity that would result in a  
10 violation of state or federal statute...”

11 The California Supreme Court has since clarified that, “[California Labor Code]  
12 § 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating  
13 and adjudicating section 1102.5 whistleblower claims.” *Lawson*, 12 Cal. 5th at 712.  
14 Section 1102.6 sets forth a two-part inquiry. *Id.* “First, it places the burden on the  
15 plaintiff to establish, by a preponderance of the evidence, that retaliation for an  
16 employee’s protected activities was a contributing factor in a contested employment  
17 action.” *Id.* at 718. “Once the plaintiff has made the required showing, the burden shifts  
18 to the employer to demonstrate, by clear and convincing evidence, that it would have  
19 taken the action in question for legitimate, independent reasons even had the plaintiff  
20 not engaged in protected activity.” *Id.*

21 Here, Plaintiff cannot show by a preponderance of the evidence that his alleged  
22 protected activity was a contributing factor in PPG’s decision to terminate his  
23 employment.

24 **1. Plaintiff cannot show by a preponderance of the evidence that**  
25 **any alleged protected activity was a contributing factor in**  
**PPG’s decision to terminate his employment.**

26 Fatal to Plaintiff’s prima facie case is the fact that there is no evidence the  
27 decision makers – Moore, Mayhew and Kacsir – had *any* knowledge that Plaintiff  
28

1 submitted two anonymous complaints until *after* Plaintiff filed his lawsuit.<sup>8</sup> (SUF 77.)  
2 This is consistent with Plaintiff's testimony that he did not disclose to Moore, or anyone  
3 else at PPG, that he submitted either of the two anonymous complaints. (SUF 35-37,  
4 57, 59-61, 77.) Because the individuals involved in the decision to terminate Plaintiff's  
5 employment did not know Plaintiff submitted either anonymous complaint until *after*  
6 Plaintiff was terminated, Plaintiff cannot show that his alleged actions were a  
7 contributing factor in the Company's decision to terminate his employment. *See Feretti*  
8 *v. Pfizer Inc.*, No. 11cv4486, 2013 WL 140088, at \*10 (N.D. Cal. June 6, 2016) ("Thus,  
9 Plaintiff may establish causation by showing that: (1) one of the decision makers  
10 responsible for each of the adverse employment actions taken against Plaintiff had  
11 knowledge that Plaintiff had engaged in protected activity, and (2) there is a close  
12 proximity in time between the protected activity and the adverse employment action.")

13 In Opposition to PPG's early motion, Plaintiff argued that Moore must have  
14 deduced that Plaintiff made the anonymous reports. This baseless contention is flawed  
15 because Plaintiff has no evidence that Moore knew of the April 2017 or June 2017  
16 anonymous reports in the first place. (SUFs 34-37, 59). Although Dalton met with  
17 Moore about mistinting, Dalton told Moore that PPG's investigation was initiated to  
18 review expensed-out product, and Dalton *never* revealed to Moore that an anonymous  
19 complaint had been filed. (SUF 53). There is no evidence in the record to contradict  
20 this fact.

21 Although notably absent from his Second Amended Complaint, during  
22 deposition Plaintiff testified that he allegedly told Moore that he "wasn't comfortable  
23 purposely ruining paint." (Lawson Depo., 155:14-157:5). Even if the Court were to

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24 <sup>8</sup> Although the outcome is the same, technically the Court need only conclude the  
25 undisputed evidence establishes the decision makers had no knowledge of the April  
26 2017 complaint as that is the only alleged protected activity articulated in the SAC.  
27 (SAC, ¶¶8, 11-15.) *See Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992  
28 (9th Cir. 2006) ("[S]ummary judgment is not a procedural second chance to flesh out  
inadequate pleadings.")



1 believe Lawson made such comments directly to Moore, despite his repeated testimony  
2 that he wanted to remain anonymous and never told Moore about his reports to PPG,  
3 the alleged statements to Moore occurred after the April 2017 Market Walk and after  
4 PPG made the decision to place Plaintiff on a PIP. (Lawson Depo., 156:13-15  
5 (confirming the alleged conversation with Moore occurred “the next time I saw him,  
6 which I don’t remember when it was.”; Lawson Depo., 258:23-259:19 (confirming the  
7 conversation with Moore was in person); SUF 17-22.) Plaintiff’s alleged statements to  
8 Moore also occurred *before* Plaintiff’s July Market Walk, wherein he scored a 66 –  
9 “Marginal” – which was higher than his previous three Market Walks with Moore, and  
10 *before* his PIP was extended an additional 30 days. (SUFs 64-66.) These positive  
11 actions, in relation to the negative actions that occurred prior to the alleged protected  
12 statement, completely belie any inference of a retaliatory bias by Moore (assuming that  
13 he was even aware of the alleged statement in the first place).

14 The Fifth District’s decision in *Abernathy v. Duncan Enterprises* (June 2, 2022),  
15 2022 WL 1789908, is instructive.<sup>9</sup> In *Abernathy*, the trial court originally granted  
16 judgment for defendant on plaintiff’s Section 1102.5 claim following application of the  
17 *McDonnell Douglas* test. On appeal, following *Lawson*, the Court applied Section  
18 1102.6. As to the plaintiff’s burden of proof, the Court noted that “[u]nder section  
19 1102.6, *Abernathy* was required to come forward with evidence upon which a  
20 reasonable inference can be drawn to suggest that her protected action of reporting  
21 Waples was a contributing factor in her dismissal. The evidence submitted permits no  
22 such inference.” *Abernathy*, 2022 WL 1789908 at \*9. The Court outlined the following  
23 as the distinction between the *McDonnell Douglas* framework and Section 1102.6 with  
24 respect to plaintiff’s burden of proof:

25 While one can proceed through the *McDonnell*  
26 *Douglas* framework by merely showing the bare facts of a  
report, an adverse action, and some circumstance suggesting

27 \_\_\_\_\_  
28 <sup>9</sup> PPG acknowledges this decision is unpublished. PPG is not citing this case as binding authority; only for illustrative purposes.

1 discrimination, the analysis under section 1102.6 requires, at  
2 a minimum, some valid inference that the protected action  
3 was a contributing – i.e., substantial or motivating – factor in  
4 the resulting harm. (Compare *Guz, supra*, 24 Cal.4th at p.  
5 355 (*McDonnell Douglas* test) with *Lawson, supra*, 12  
6 Cal.5th at pp. 714-715 (substantial or motivating factor  
7 requirement), citing *Mt. Healthy City Board of Ed. v. Doyle*  
8 (1977) 429 U.S. 274, 287.)

9 *Id.*

10 Taken in its totality, Plaintiff only has mere speculation that his anonymous  
11 complaints and/or statement to Moore was a contributing factor in PPG's decision to  
12 terminate his employment. Plaintiff's speculation defies logic: Plaintiff intended to  
13 remain anonymous (SUFs 29, 34-37, 43); Plaintiff never disclosed that he reported  
14 Moore to anyone at PPG (SUFs 34, 36, 37, 43, 59); Moore was unaware any anonymous  
15 complaints had been submitted (SUFs 37, 53, 59, 77); none of the decision makers was  
16 aware that Plaintiff had made any anonymous complaints (SUF 77); Plaintiff's alleged  
17 statement to Moore that he did not think mis-tinting was right occurred after Plaintiff  
18 had missed his sales goal for 8 of the past 12 months (SUF 18, 82), after Plaintiff had  
19 scored poorly on three consecutive market walks (SUF 11, 14, 23), after Human  
20 Resources decided to put Plaintiff on a PIP (SUF 19, 21), and before Plaintiff received  
21 his highest Market Walk score under Moore (SUF 64), and before Plaintiff's PIP was  
22 extended for an additional 30 days (SUF 66).

23 As in *Abernathy*, there is no evidence to support a valid inference that Plaintiff's  
24 anonymous complaints were even discussed or considered in any way by those who  
25 made the decision to terminate Plaintiff's employment, let alone that they were a  
26 contributing (*i.e.*, substantial or motivating) factor in the termination decision.  
27 Therefore, PPG is entitled to summary judgment on Plaintiff's Section 1102.5 claim.

28 **2. Assuming arguendo that Plaintiff's alleged protected activity was a contributing factor, PPG has established that the termination would have occurred for legitimate, independent reasons.**

Only after Plaintiff establishes by a preponderance of the evidence that the



1 alleged protected activity was a contributing factor in his termination, does the burden  
2 shift to PPG. Once shifted, PPG has the burden to demonstrate, by clear and convincing  
3 evidence, that it would have taken the action in question for legitimate, independent  
4 reasons even had Plaintiff not engaged in protected activity. *Lawson*, 12 Cal. 5th at 718.  
5 Clear and convincing evidence does not require absolute certainty; only that it is highly  
6 probably that the fact is true. *See* CACI 201; *Vatalaro v. County of Sacramento* (2022)  
7 79 Cal.App.5th 367, 386 (citing *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1011-  
8 1012 (discussing appellate review of findings made under the clear and convincing  
9 evidence standard.) In *Vatalaro*, the trial court initially granted summary judgment  
10 under the *McDonnell Douglas* framework. On appeal, following *Lawson*, the Third  
11 Appellate District applied the framework set forth in Section 1102.6 and affirmed  
12 summary judgment in favor of the employer. The *Vatalaro* court concluded that the  
13 employer had presented sufficient undisputed evidence to satisfy its burden under  
14 Section 1102.6 (*i.e.*, that it would have terminated plaintiff's employment even if  
15 plaintiff had not engaged in protected activity), and that none of the plaintiff's  
16 arguments raised a triable issue of material fact.

17 The same outcome holds true here. Long before any alleged protected activity  
18 occurred, Plaintiff struggled with his performance. Beginning in October, 2016,  
19 Plaintiff missed his sales goal for six consecutive months. (SUF 18). Between  
20 November 2016 and April 2017, Plaintiff had three Market Walks, all of which  
21 indisputably occurred before Plaintiff participated in any protected activities. (SUF 11,  
22 14, 23). On these three Market Walks, Plaintiff received an "unsuccessful" score twice  
23 and a "marginal score" once. (*Id.*) Thus, the evidence clearly established that Plaintiff  
24 consistently performed poorly on his Market Walks during the time he reported to  
25 Moore even before Plaintiff made an anonymous report to PPG regarding Moore's  
26 alleged misconduct. The fact that Plaintiff received one "excellent" score in October  
27 2016 does not change this conclusion.

28 Additionally, as early as December 2016, Plaintiff's Market Walks demonstrate

1 Plaintiff consistently had issues with specific duties such as maintaining an up-to-date  
2 Training Roster, developing relationships with key employees at the Lowe's stores in  
3 Plaintiff's territory, and placing product in required areas throughout the Lowe's stores  
4 in Plaintiff's territory. (SUF 11-17, 23-25). Plaintiff's poor sales performance, coupled  
5 with his low Market Walk scores, warranted the Performance Improvement Plan (PIP).  
6 (SUF 18-21, 38-40.) Quite tellingly, Plaintiff's SAC makes no mention of the fact he  
7 was on a PIP, and in turn, fails to allege any impropriety with the Company's decision  
8 to place him on a PIP.

9 Plaintiff had 60 days in which to meet the requirements of the PIP, a period that  
10 was extended for 30 days following the July 2017 Market Walk. (SUF 65-66.) Even  
11 with the additional time, Plaintiff failed to successfully complete the PIP. (SUF 63, 69.)  
12 To the contrary, Plaintiff's August 2017 Market Walk score was his lowest ever. (SUF  
13 10-12, 14, 23, 69.) It can hardly be disputed that poor performance is a legitimate and  
14 independent reason for terminating an employee, which is consistent with Judge  
15 Guildford's prior Order holding PPG offered a legitimate, nondiscriminatory reason for  
16 firing Plaintiff. (Dkt. 62 at pg. 7).

17 Although the burden no longer shifts back to Plaintiff to establish pretext, PPG  
18 has still carried its burden of showing that it would have terminated Plaintiff even if he  
19 had not engaged in any protected activity, and Plaintiff has not created a triable issue of  
20 material fact otherwise. *Vatalaro*, 79 Cal.App.5th at 386

21 First, according to several TMs, another TM, Laura Sanchez (not Plaintiff)  
22 openly opposed Moore's directive to mis-tint paint, and stated she would not carry out  
23 the practice. Ms. Sanchez, however, remained employed with PPG as a TM until  
24 Lowe's cancelled its contract with PPG in March 2018. (Moore Decl., ¶ 17.) Reason  
25 and logic dictate that if an employee's alleged opposition to Moore's directive resulted  
26 in Moore having a retaliatory animus, then Ms. Sanchez surely would have suffered the  
27 same fate as Plaintiff. The fact that she did not is compelling evidence that Plaintiff  
28 would have been discharged even if he had not engaged in protected activity.

1 Second, Plaintiff's SAC alleges that after he made the April 2017 complaint,  
2 "Moore proceeded to unfairly score [Plaintiff's] market walk evaluations in order to  
3 give him failing scores, starting with Lawson's July 13, 2017 market walk." (SAC, ¶  
4 17.) According to Plaintiff, these "unfair" scores are what lead to his termination. (SAC,  
5 ¶ 18.) Plaintiff's deposition testimony, however, is in direct conflict. According to  
6 Plaintiff, *every* Market Walk on which Moore scored him – both *before and after* the  
7 April 2017 complaint –was unfair. (SUF 78.) Plaintiff also confirmed Moore did not  
8 make any comments to him or say anything to him that would give him any indication  
9 as to why Moore might be unfairly scoring Plaintiff's Market Walks. (SUF 79.)  
10 Critically, Plaintiff's July 2017 Market Walk score (66) was *higher* than each of his  
11 previous three Market Walks in December 2016 (60), March 2017 (58), and April 2017  
12 (46). (SUF 11, 14, 23.)

13 Third, although Plaintiff adamantly denies he "falsified" his training roster, it is  
14 undisputed that Mayhew, a decision maker, honestly believed that Plaintiff had falsified  
15 his training records. (SUF 80.) Additionally, Plaintiff's denial is nothing more than  
16 semantics. Indeed, Plaintiff admits he incorrectly inputted information, and, sometimes,  
17 his Training Rosters were wrong. (SUF 81.) Regardless of the terminology used, the  
18 outcome is the same – Plaintiff's Training Roster contained inaccuracies, and the issues  
19 with his Training Roster date as far back as his December 2016 Market Walk, which  
20 predates Plaintiff's first anonymous complaint by nearly four months, and Plaintiff's  
21 second anonymous complaint by almost six months. (SUF 12-13, 38-40, 71, 71, 80-81.)

22 Ultimately, PPG has carried its burden of showing that the undisputed evidence  
23 would require a reasonable fact finder to find it "highly probable" that PPG's decision  
24 to terminate Plaintiff would have occurred for legitimate, independent reasons even if  
25 Plaintiff had not complained about the directive to mis-tint paint. *Vatalaro*, 79  
26 Cal.App.5th at 386.

27 ///

28 ///

1           **C. Plaintiff's Second Cause Of Action for wrongful termination in**  
2           **violation of public policy fails.**

3           Under California law, “[t]he elements of a claim for wrongful discharge in  
4 violation of public policy are (1) an employer-employee relationship, (2) the employer  
5 terminated the plaintiff’s employment, (3) the termination was substantially motivated  
6 by a violation of public policy, and (4) the discharge caused the plaintiff harm.” *Nosal–*  
7 *Tabor v. Sharp Chula Vista Med. Ctr.*, 239 Cal.App.4th 1224, 1234–35, (2015) (internal  
8 quotation marks and citation omitted). A wrongful discharge in violation of public  
9 policy is a common law claim, and, therefore, the California Supreme Court’s decision  
10 in *Lawson* does not change the analysis – or this Court’s earlier determination that  
11 summary judgment should be granted on Plaintiff’s Second Cause of Action. *See*  
12 *Gavriliuc v. TEKsystems, Inc.*, 2022 WL 2965667 at \*6, fn. 4 (C.D. Cal. 2022) (holding  
13 the *McDonnell Douglas* test is the relevant test for Courts to analyze a plaintiff’s  
14 wrongful termination in violation of public policy claim). Stated otherwise, while the  
15 burden of proof set forth in Section 1102.6 applies to Plaintiff’s Section 1102.5 claim,  
16 the *McDonnell Douglas* framework continues to apply to Plaintiff’s public policy claim.

17           Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Plaintiff’s claim  
18 fails for multiple reasons. First, Plaintiff cannot establish a prima facie case since there  
19 is no evidence that the decision makers were away of either of the two anonymous  
20 complaints, and that he was the reporting party. Second, even if a prima facie case is  
21 established, PPG had a legitimate, non-retaliatory reason for terminating Plaintiff’s  
22 employment. (Dkt. 62 at pg. 7).

23           At that point, the burden then shifts back to the Plaintiff to prove that PPG’s  
24 proffered reasons for termination are pretextual. *See Guz v. Bechtel Nat’l, Inc.*, 24  
25 Cal.4th 317, 356 (2000). “[T]he plaintiff may establish pretext either directly by  
26 persuading the court that a discriminatory reason more likely motivated the employer  
27 or indirectly by showing that the employer’s proffered explanation is unworthy of  
28 credence.” *Morgan v. Regents of University of California*, 88 Cal.App.4th 52, 68

(2000). (internal quotations omitted.) If the plaintiff relies solely on circumstantial evidence, then he “must produce specific, substantial evidence of pretext.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (internal quotations omitted). “Where the evidence of pretext is circumstantial, rather than direct, the plaintiff must present ‘specific’ and ‘substantial’ facts showing that there is a genuine issue for trial.” *Noyes v. Kelly Services*, 488 F.3d 1163, 1170 (9th Cir. 2007) (quoting *Godwin*, 150 F.3d at 1222). A plaintiff must show more than that the employer’s justification is false because “courts only require that an employer honestly believed its reason for action, even if its reason is foolish or trivial or even baseless.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (internal citation and quotation marks omitted).

Plaintiff can offer no evidence outside of his own speculation that PPG’s reasons for terminating his employment (*i.e.*, his failure to meet the requirements of the PIP and falsifying his training roster) were pretext. This was confirmed by Judge Guilford previously, and should be reaffirmed by this Court.

**D. Plaintiff Is Not Entitled To Punitive Damages As A Matter Of Law.**

“In California there is no separate cause of action for punitive damages.” *McLaughlin v. Nat’l Union Fire Ins. Co.*, 23 Cal. App. 4th 1132, 1164 (1994). To obtain punitive damages, a plaintiff must first prove that there was a tortious act that gave rise to actual, presumed, or nominal damages. *Id.* Further, a plaintiff must show malice, oppression, or fraud. Cal. Civil Code § 3294; *see also, Blincow v. MillerCoors, LLC*, 2018 WL 3869162, at \*5 (2018) (granting employer’s motion for summary on plaintiff’s punitive damages claim because plaintiff failed to cite any authority to show defendant’s conduct met the “uniquely high standard” required by punitive damages).

Despite deposing seven PPG employees – Dalton, Duffy, Moore, Kacsir, Mayhew, Minda, and Cathie McKinley – Plaintiff cannot identify any evidence, let alone clear and convincing evidence, to support his claim for punitive damages. Indeed, by his own admission, Plaintiff has no reason to believe anyone at PPG was aware of

1 his anonymous complaints. (Lawson Depo., 169:25-170:2.) Additionally, Moore who  
2 allegedly retaliated against him, harbored no ill-will towards Plaintiff and in fact  
3 supported the decision to extend his PIP by an additional 30 days because he did not  
4 take the decision to terminate Plaintiff lightly. (SUF 65-67, 83.)

5 Accordingly, there is no triable issue of fact concerning punitive damages and  
6 summary judgment on Plaintiff's request for punitive damages should be granted.

7 **V. CONCLUSION**

8 For the reasons stated above, Judgment should be granted in PPG's favor on  
9 Plaintiff's First and Second Causes of Action, and in the alternative on Plaintiff's claim  
10 for punitive damages.

11  
12 Dated: August 31, 2022

13  
14 /s/ Karin M. Cogbill  
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